76-1493

IN THE

Supreme Court of the United States

October Term 1976

No. _____

CARL E. BROWN,

Petitioner,

vs.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Carl E. Brown, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on April 1, 1977.

OPINIONS BELOW

The opinion of a division of the Court of Appeals dated April 1, 1977, to be reported, is attached hereto (A-2). Request for re-hearing In Banc dated April 9, 1977 not acted upon.

The memorandum opinion of the U. S. District Court, dated November 5, 1976, to be reported, is attached hereto (A-11).

The order and memorandum of the U. S. Magistrate, dated April 26, 1976, is unreported and is attached hereto (A-27).

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1977. The jurisdiction of this Court is invoked under 28 USC 1254 and 28 USC 2106.

QUESTION PRESENTED

Whether the property clause of the Constitution authorizes by implication the enforcement of Federal Criminal Administrative regulations as to acts mala prohibita only on state owned non-federal property where the state has not ceded jurisdiction and Congress has not authorized it.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS, NOTICES AND ORDERS INVOLVED

(1) *Constitution of United States*
Article 4, Sec. 3, Cl. 2 (Property Clause)

(2) *Acts of Congress*
(a) Act of August 28, 1916, C 408, Sec. 3; 39 Stat 535; (as amended)—*16 USC 3* (National Park Service—Authority for Regulation)
(b) Act of Congress of January 8, 1971, 84 Stat 1970; Pub-Law 91-661—*16 USC 160* et seq (Voyageurs Nat'l. Park)

(3) *Federal Administrative Notice*
40 Federal Register No. 68, Doc. 75-9288 (Formal Notice of Establishment of Park) 4/7/75 9:48 a.m.

(4) *Laws of Minnesota and Order*
(a) 3 Minn. Stat Ann. 1.042, 1.043 and 1.046 (Cession of Jurisdiction)
(b) 9 Minn. Stat. Ann. 105.37 and 105.038 (Waters Policy)
(c) 8 Minn. Stat. Ann. 84B, 01-10 (Voyageurs Park)
(d) Order of Minnesota Department of Natural Resources
No. 1947 (August, 1976)

STATEMENT OF THE CASE

1. Facts

Carl E. Brown was convicted of violation of two Park Service administrative criminal regulations. 36 CFR 2.11 and 2.32. These alleged violations occurred October 7, 1975 on the public waters of Minnesota near, but not upon, lands owned by the Federal Government as National Park lands.

It is admitted that Brown was on the public waters of Minnesota and did the acts claimed to constitute the offenses (hunting ducks with a shotgun). It is conceded that this activity of defendant Brown was specifically authorized by the laws of Minnesota including official orders of the Minnesota Department of Natural Resources. There is no contention that defendant Brown did not have a valid Minnesota license or that he was guilty of any other offense.

2. Background

On January 8, 1971 the Congress enacted a law, 16 USC 160 et seq.; Public Law 91-661; 84 Stat. 1970, authorizing the establishment of a National Park in Minnesota. It authorized

the acquisition of certain lands within a specific area. It expressed an intent to include the waters within that area, but did not provide for or authorize the acquisition of those waters or the beds beneath. No steps or proceedings have ever been instituted to acquire those waters.

On June 4, 1971 the State of Minnesota enacted a law, Laws of 1971, C. 852; Minn. Stat. Ann. 84B 01-10 in which it concurred in the purpose for establishing a Park. This law provided for the acquisition and donation of specific lands and ceded jurisdiction over these lands. It did not provide for, authorize or donate waters or the beds beneath. It did not cede jurisdiction over any waters of Minnesota. (See A-33-39)

On April 8, 1975 the Secretary of the Interior pursuant to the Federal Act, 16 USC 160a formally established the Park by Notice published in the Federal Register. (A-32). This Notice referred to the lands by specific description and established the Park thereon.

Subsequently, the Minnesota Commissioner of Natural Resources by three orders, No. 1932 of August 20, 1975; No. 1935 of September 8, 1975; No. 1947 of August 13, 1976, (A-40 No. 1947) prohibited hunting within the Park Area except waters in Black Bay of Rainy Lake. The excepted waters are the situs of the alleged offenses here.

3. Proceedings In The Courts Below

On October 9, 1975 defendant Brown appeared in the U. S. Magistrate Court at International Falls, Minnesota in response to the citations. He consented to have the matter heard by the Magistrate and objected to the jurisdiction. This question was presented to the Magistrate on briefs. On April 26, 1976 the order and memorandum of the Magistrate (A-27)

overruled the objection and ordered defendant to appear for plea. On May 28, 1976 defendant appeared before the Magistrate, stood mute, a plea of not guilty was entered for him and he was convicted as charged. On the same date defendant Brown appealed to the U. S. District Court to review the issue of jurisdiction.

On August 19, 1976 the matter was heard in the U. S. District Court at Minneapolis, Minnesota. At this time the State of Minnesota was allowed to participate as Amicus Curiae in support of the contentions of defendant Brown. The State of Minnesota asserted that the U. S. had not acquired any jurisdiction over the waters involved. Briefs were submitted and on November 4, 1976 the U. S. District Court affirmed the conviction but on different grounds.

On November 4, 1976 defendant Brown served a Notice of Appeal to the Court of Appeals which was filed November 11, 1976. The State of Minnesota was permitted to continue as Amicus Curiae and briefs were filed. On February 14, 1977 arguments were heard by the Court of Appeals and the State of Minnesota was permitted to argue its position. On April 1, 1977 the decision of the Court of Appeals affirmed the District Court and Judgment was entered on that date.

REASON FOR GRANTING THE WRIT

(a) The Court of Appeals for the Eighth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. Its decision involves a question of exceptional importance.

(b) The Court of Appeals for the Eighth Circuit has decided a federal question in conflict with applicable decisions of this Court.

ARGUMENT

(1) Important Open Question

The question, clear and precise, has not previously been decided by this Court. In *Kleppe v. New Mexico*, 426 US 529, 96 S. Ct. 2285 at 2295 this court declared the question open and declined to decide it in the context of that case. The Court of Appeals here identifies this issue and states:

> ". . . the instant case presents the question left open in Kleppe" (A-3, page 7 text of original opinion.)

Here this case presents a direct conflict between the laws of Minnesota and federal administrative regulations as applied. The widely diverse federal land ownership is most substantial throughout the nation. Every state and local government is directly and vitally concerned in this exceptionally expansive treatment of the property clause. Under the view of the Courts below ordinary accepted conduct, authorized, permitted and promoted by state and local law, will become unlawful and criminal depending upon federal administrative interpretation. The occasion for state-local versus federal conflict will be widespread as to activity on or concerning non-federal property. The subordination of state and local policy will be quickly accomplished by casual application of the supremacy clause. That is the circumstance here.

(2) Ownership and Jurisdiction of the Situs here.

It is conceded that the State of Minnesota and not the Federal Government owns the waters and the beds beneath that are here concerned. *Martin v. Waddell*, Lessee, 41 US 367; *Lamphrey v. State* (Mitchell J.), 52 Minn. 181, 53 N.W. 1319;

State v. Longyear Holding Co., 224 Minn. 45, 29 NW(2) 657; *State v. Bollenbach*, 241 Minn. 103, 63 NW(2) 278; *State v. Kuluvar*, 266 Minn. 408, 123 NW(2) 699.

It is admitted that the State of Minnesota has *not* ceded any jurisdiction over these waters. The District Court below specifically so found. The Court of Appeals assumed the same as a basis of its decision. The District Court said:

> "It is also not legally sufficient to say that because Minnesota concurred with the United States in the purpose for establishing the park that it intended to cede jurisdiction over the waters to the national sovereign.

and

> "Furthermore, this court cannot assume that retention by the state of jurisdiction over the waters in the park would be or is incompatible with the purpose (of the park) . . ." (A-11, District Court opinion pp. 3-4).

The State of Minnesota vigorously contends that it did not intend to and did not cede any jurisdiction over these waters to the national government. In its order No. 1947 of the Department of Natural Resources (A-40) it is recited as follows:

> "WHEREAS, state land transfer legislation (Laws of Minn. 1971 Chap. 852) provided for the donation of more than 37,000 acres of State and County lands to the United States for inclusion in the Park, but neither that nor any other legislation ceded to the United States any jurisdiction over the waters within the Park boundaries, and
>
> WHEREAS, in the absence of any such cession, the state, which owns much of the water within the park boundaries in trust for the people of Minnesota, retains its full jurisdiction over public waters within said

boundaries, including the jurisdiction to regulate hunting, trapping and fishing thereon;"

Minnesota has great reason and purpose for retaining jurisdiction and control of these waters. Numerous people live in and adjacent to the water area. The waters are public highways, means of access to and from homes and businesses. For over 150 miles of distance from upper Rainy Lake to Crane Lake there are no roads. (There are only two access roads on the south shore of Lake Kabetogama) the waterways are extensively used for transportation of food, utility and maintenance supplies. Tourist travel, the third major business of Minnesota, is extensive on the waters for recreation and sport fishing. There is no road access to the Canadian shores and the waterways are used for access to both Canadian and American owned properties there. The Canadian and U. S. Government maintain permanent customs and immigration stations to serve these uses. The waters are used for the landing of aircraft and more than a dozen small airlines so use the waters. Travel over the ice in the winter season is extensive for both recreation and business purposes. There are underwater electric and telephone cables installed and maintained in these waterways. The portion of Black Bay of Rainy Lake here involved is one of the finest duck hunting areas existing and has been so used for countless decades. These uses are and have been carried on for more than a century without a whit of interference with the lands on which the National Park has been established. In fact with long state, local government and citizen cooperation these lands have been maintained in the present beautiful and pristine condition that make them so desirable for a National Park. The generosity of Minnesota is returned with a covetous seeking for control of the waterways which was not in any way intended. Even so Minnesota has committed itself to cooperation with the Park Service by adoption of policies for the waterways most compatible to the policies of the Park Service. Except for the small portion of the waterways here concerned at Black Bay, Minnesota has prohibited hunting and other activities thereon in deference to the Park Service (See order No. 1947 A-40) and the formal expressions of policy contained in the Minnesota Voyageurs Park Law, Minn. Stat. Ann. 84B 01-10. (A-37, 38, 39)

(3) Conflict with Applicable Decisions of this Court.

The courts below here assumed that the authority under the property clause is the same as to both non-federal and federal lands. The decision below is in conflict with the following cases, all of which were considered in *Kleppe*, supra.

In *Colorado v. Stoll*, 268 US 228, 45 S. Ct. 505, the State of Colorado brought an action against the superintendent of the Rocky Mountain National Park. The State contended that it had not ceded any jurisdiction to the Park Service to control state highways in the Park and sought to enjoin him. The U. S. District Court dismissed the case. The State took a direct appeal to this court. This court, speaking through Justice Holmes, reversed. The State of Colorado contended it had not ceded any such jurisdiction. The Park Service contended it was asserting control of the highways under a federal statute which, as here, granted authority to make such reasonable regulations as the Secretary of the Interior deemed necessary for the management of the Park to preserve the natural conditions and scenic beauties thereof. The opinion of the Court stated:

> "The statute establishing the Park would not be construed to attempt such a result . . . As the defendant is undertaking to assert exclusive control and establish a monopoly in a matter as to which, if the allegations of the bill are maintained, the State has not surrendered its legislative power . . . The cases cited for defendant do not warrant any such extension of power of the United States over land within a state . . ."

Although that case arose on the pleadings, it clearly indicates the view, without specific reference to the property clause, that no authority existed for federal control of non-federal property (state highway through a national park).

This Court again speaking through Justice Holmes in *U.S. v. Alford*, 274 US 264, 47 S.Ct. 597, pointed out the circumstances in which it was held that Congress, by a specific and direct statute, could protect lands of the United States by prohibiting acts on non-federal land. In this case, the Act of Congress made criminal the act of causing forest fires on non-federal property which endangered the public forests. The Court said in this respect:

> "The purpose of the Act is to prevent forest fires which have been *one of the great economic misfortunes of the country*", and
>
> "Congress may prohibit the doing of acts upon privately owned lands that *imperil* the publicly owned forests." (Emphasis supplied.)

It is one thing to approve the prohibition by statute of acts on non-federal land *that cause great misfortune* and *imperil* the public forests. It is quite another thing to say that this same approval vests authority in administrative personnel

to adopt or interpret administrative regulations to criminalize ordinary accepted conduct on non-federal property, especially where the act is only mala prohibita on federal property because of aesthetic or other reasons of far less import.

This court again in *McKelvey v. U.S.*, 260 US 353, 43 S.Ct. 132, approved a criminal statute directly enacted by the Congress to prohibit the unlawful preventing and *obstructing by means of force, threats, and intimidation* of free passage over lands of the United States. This case involved a western range war between cattlemen and sheepmen. The conviction of the defendants for violating this statute by intentional shooting and seriously wounding persons lawfully seeking to cross federal lands was upheld. The implication of the case is that Congress had such power whether the offense was committed on federal or non-federal lands so long as the intent was to so obstruct the free passage over federal lands.

In *Camfield v. U.S.*, 167 US 518, 17 S.Ct. 864, a specific act of Congress designed to prevent unlawful occupancy of federal lands was considered. This, however, was *not* a criminal statute. The statute simply authorized the United States Attorney to bring a *civil suit* to enjoin by writ of injunction any such unlawful occupancy. Here the defendants sought to occupy and enclose 20,000 acres of federal land by a stratagem of seemingly ingenious fencing, the fences being placed for miles just outside the boundary line of federal lands resulting in their complete enclosure. An injunction was granted and the defendants appealed. In the context of those circumstances, this court affirmed the granting of the injunction without specific reference to the property clause. The decision clearly indicates that the power of the federal government over non-federal property is to be measured by the exigency of the circumstances.

In addition, the court below assumed that the general authority found in 16 USC 3 (A-31) was unlimited and without need for guide lines and rules. The decision is in conflict with *Schecter Poultry Corp. v. U.S.*, 295 US 495, 55 S.Ct. 837, *Panama Refining Co. v. Ryan*, 293 US 388, 55 S. Ct. 241 as well as *Kent v. Dulles*, 375 US 116, 78 S.Ct. 1113.

CONCLUSION

The federal government does not own the waters here involved. The State of Minnesota did not intend to or cede any jurisdiction over these waters. The State of Minnesota controls the waters here involved. The federal government has expansive powers with respect to its own lands. It does not have unlimited or expansive powers as to non-federal lands.

The federal statutory authority authorizing administrative regulation of federally owned lands is not authority for administrative regulation of non-federal property in the circumstances here.

Petitioner respectfully prays that this Court grant the petition for certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

April 1, 1977

Re: No. 76-2017 U. S. v. Carl E. Brown

Dear Sir:

Enclosed herewith for use of counsel, printed copy of the opinion of this Court filed today in the above case. Judgment of this Court in accordance with the opinion is also entered today.

Very truly yours,
ROBERT C. TUCKER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-2017

UNITED STATES OF AMERICA,

Appellee,

vs.

CARL E. BROWN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Submitted: February 14, 1977
Filed: April 1, 1977

Before LAY and STEPHENSON, Circuit Judges, and SMITH,* Senior District Judge.

STEPHENSON, Circuit Judge.

Carl E. Brown appeals from his conviction for violation of National Park Regulations prohibiting possession of a loaded firearm and hunting in national parks. The issue presented in this appeal is whether the United States has jurisdiction to enforce regulations controlling activities on waters within the boundaries of Voyageurs National Park. For the reasons stated below, we affirm.

The facts are undisputed. On October 7, 1975, Carl E. Brown went duck hunting within the boundaries of Voyageurs

* The Honorable Talbot Smith, United States Senior District Judge for the Eastern District of Michigan, sitting by designation.

National Park in northern Minnesota. While his boat was afloat on a portion of Rainy Lake known as Black Bay, Brown was served with a citation for violations of National Park Service Regulations prohibiting possession of a loaded firearm and hunting of wildlife in national parks. 36 C.F.R. §§ 2.11 and 2.32. Brown concedes that he was hunting ducks on water within the park. At the time and place of the violations, duck hunting by licensed hunters was permitted under state law.[1] There has been no showing that Brown did not have a valid state hunting license in his possession.

Pursuant to 18 U.S.C. § 3401, Brown consented to be tried by a United States Magistrate but filed a motion to dismiss stating that the United States does not have jurisdiction over the waters in Voyageurs National Park. He contended that the state of Minnesota had deeded the lands within the park boundaries to the federal government but the state had not relinquished ownership of the waters. After a hearing the magistrate denied the motion to dismiss, determined that Brown was guilty and sentenced him to pay fines of $50 and $100 for violation of section 2.11 and section 2.32 respectively. The magistrate found that the federal government and the state had worked in concert to establish Voyageurs National Park. The magistrate made no precise finding relative to the actual ownership of the waters within the park boundaries but concluded, nonetheless, that the state had ceded concurrent jurisdiction over the waters to the United States.

[1] *See* Order of the Minnesota Commissioner of Natural Resources No. 1932 (August 20, 1975); Order No. 1935 (September 8, 1975); Order No. 1947 (August 8, 1976). The state of Minnesota has prohibited hunting and trapping in Voyageurs National Park with the exception of waters in a portion of Black Bay on Rainy Lake. Although the state has not yet indicated any intention to allow hunting in other areas in the park, future policy is of course uncertain.

Brown subsequently appealed his conviction to the district court,[2] in order to obtain reconsideration of the jurisdictional issue. *See* Fed. R. P. for the Trial of Minor Offenses Before United States Magistrates 8(a). The state of Minnesota was allowed to participate as amicus curiae because of its contention that the federal government does not have jurisdiction over the public navigable waters within Voyageurs National Park. The district court found that the state of Minnesota had not ceded jurisdiction over the "waters" to the United States but had only granted concurrent jurisdiction over the "lands" acquired by the federal government. Nevertheless, the district court concluded that the Property Clause of the Constitution provides congressional power to prohibit hunting and possession of loaded firearms within the boundaries of the national park. Brown's conviction was affirmed on that basis, and this appeal followed.

The threshold question to be considered is whether the state of Minnesota ceded jurisdiction over the waters within Voyageurs National Park to the United States.[3] There are approximately 139,000 acres of land and 80,000 acres of water inside the park's boundaries. The congressional intention to exercise regulatory jurisdiction over the waters in the park is clearly demonstrated in the Voyageurs National Park Act. 16 U.S.C. § 160 *et seq.* The Act provides:

> The purpose of sections 160 to 160k of this title is to preserve, for the inspiration and enjoyment of present

[2] The Honorable Miles W. Lord, United States District Judge for the District of Minnesota.

[3] The waters in question are located within the park boundaries but are owned by the state of Minnesota. The deed by which the state conveyed the lands in the park to the United States expressly reserved "all water power rights" to the state. The place where Brown was hunting is available by water from outside the boundaries of the park without entering upon the lands of the United States.

> and future generations, the outstanding scenery, geological conditions, *and waterway system* which constituted a part of the historic route of the Voyageurs who contributed significantly to the opening of the Northwestern United States.
>
> * * *
>
> The park shall include the lands *and waters* within the boundaries as generally depicted on the drawing entitled "A Proposed Voyageurs National Park, Minnesota," numbered LNPMW VOYA-1001, dated February 1969, which shall be on file and available for public inspection in the offices of the National Park Service, Department of the Interior.

16 U.S.C. §§ 160, 160a (emphasis added).

Furthermore, the legislative history of the Act shows the congressional intention to include 139,000 acres of land and 80,000 acres of water within the perimeter of the park. S. Rep. No. 1513, 91st Cong., 2nd Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 5965. The Committee on Interior and Insular Affairs acknowledged that "Taken together, these lakes and the network of connecting waterways make this area a unique and beautiful setting for a national park." *Id.* According to the committee, the Secretary of the Interior was not authorized to establish the park until "he deems sufficient interest in the lands and waters within the park have been acquired for administration in accordance with the act." *Id.* at 5967.

Congress can acquire exclusive or partial jurisdiction over lands or waters within a state by the state's consent or cession. U.S. Const. art. I, § 8, cl. 17. *See Paul v. United States*, 371 U.S. 245, 264 (1963); *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 541-42 (1885); *Petersen v. United States*, 191

F.2d 154, 156-57 (9th Cir.), *cert. denied sub. nom, California v. United States*, 342 U.S. 885 (1951). As recognized by the district court, however, it is improper to assume that a state has relinquished its sovereignty. *See Colorado v. Toll*, 268 U.S. 228, 231 (1925). In this case, it is not abundantly clear that the state of Minnesota ceded jurisdiction over the waters in the park to the United States. *See* Minn. Stat. Ann. §§ 84B.01 *et seq.* The state's enabling legislation in section 84B.06 ostensibly consents to federal acquisition and concurrent jurisdiction only over the lands within the park.

Nonetheless, the state of Minnesota was an active participant in the creation of Voyageurs National Park, passed enabling legislation and otherwise encouraged the development of the park. Minn. Stat. Ann. §§ 84B.01 *et seq.* In section 84B.01 the enabling legislation expresses that:

* * *

* * * The legislature concurs with the stated purpose of Congress in authorizing the establishment of the park. It is, therefore, the purpose of sections 84B.01 to 84B.10 to preserve, for the inspiration and enjoyment of present and future generations, the outstanding scenery, geologic conditions, *and waterway system* which constituted a part of the historic route of the voyageurs, who contributed significantly to the opening of the northwestern United States.

* * * Sections 84B.01 to 84B.10 are a necessary first step in the establishment of the park and is in furtherance of the provisions of section 101 of the act of Congress authorizing the establishment of the park.

(Emphasis added.) The enabling legislation's broad policy expression in section 84B.01 evinces the state's intention to embrace the federal act and implicitly if not expressly refers to both lands and waters.

Although the state of Minnesota did not expressly cede jurisdiction over the waters in the park to the United States, the state did consent to the creation of the park with the knowledge that the federal government intended to prohibit hunting within the boundaries of the park.[4] The House and Senate bills creating Voyageurs National Park originally contained distinct provisions allowing water fowl hunting and trapping in accordance with the applicable state laws. S. Rep. No. 1513, 91st Cong., 2nd Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 5965, 5972. In light of objections to such provisions by the Secretary of the Interior and the Secretary of Agriculture, however, the bills in both the House and Senate were amended to delete any hunting privileges. *Id.* at 5975, 5979-81. Moreover, in hearings related to the creation of Voyageurs Park various congressmen expressed their intention that hunting would not be allowed in a national park under any circumstances. *See* 116 Cong. Rec. 34801, 34803-06 (1970); *Hearings Before the Subcommittee on National Parks and Recreation of the Committee on Interior and Insular Affairs, House of Representatives on H. Rep. 10482*, 91st Cong., 2nd Sess. 359, 366-67 (statements of Representatives Taylor and Udall). The intent of Congress, as the district court found, should have been clear to the state of Minnesota. Correspondingly, the state's active participation in the creation of Voyageurs Park with the knowledge that Congress intended that hunting would be prohibited throughout the park was tantamount to a cessation of jurisdiction over the lands and the waters within the park boundaries.

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[4] The federal legislation was enacted January 8, 1971; the Minnesota legislation was enacted afterwards.

Assuming arguendo that the state did not cede jurisdiction over the waters in the park, we further conclude that the federal regulations prohibiting hunting in Voyageurs Park were a constitutional exercise of congressional power under the Property Clause.[5]

The Property Clause of the Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. When Congress acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. U.S. Const. art. VI, cl. 2.

The Supreme Court has most recently examined the scope of the Property Clause in *Kleppe v. New Mexico*, 426 U.S. 529 (1976). In *Kleppe* the Court held that a federal act designed to protect horses and burros on public lands was a constitutional exercise of congressional power under the Property Clause to the extent it was applied to prohibit a state agency from entering on lands of the United States and removing wild burros pursuant to state law. Again assuming the state did not cede jurisdiction over the waters to the federal government, the instant case presents the question left open in *Kleppe*: whether the Property Clause empowers the United States to enact regulatory legislation protecting federal lands from interference occurring on non federal public lands, or, in this instance, waters.

Under normal circumstances protective legislation is necessary only to control disruptions occurring on federal lands. *See, e.g., Hunt v. United States*, 278 U.S. 96, 99-101 (1928).

[5] The presence or absence of federal jurisdiction obtained through a state's consent or cession is unrelated to Congress' powers under the Property Clause. *Kleppe v. New Mexico*, 426 U.S. 529, 542-43 (1976).

But the Court's decision in *Kleppe* recognizes that when regulation is for the protection of federal property, "the Property Clause is broad enough to reach beyond territorial limits." 426 U.S. at 538. For example, the Supreme Court in *Camfield v. United States*, 167 U.S. 518 (1897), held that the Property Clause permits federal regulation of fences built on private land adjoining public land.

The crucial question is whether federal regulations can be deemed "needful" prescriptions "respecting" the public lands. This determination is primarily entrusted to the judgment of Congress, and courts exercising judicial review have supported an expansive reading of the Property Clause. *See United States v. San Francisco*, 310 U.S. 16, 28-30 (1940). In light of these general standards, we view the congressional power over federal lands to include the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the lands. *See Kleppe v. New Mexico, supra*, 426 U.S. at 540-41.[6]

In this instance the district court determined that hunting on the waters in the park could "significantly interfere with the use of the park and the purpose for which it was established." The district court found that because duck hunting occurs in close proximity to adjacent lands, there is potential danger of unwarranted intrusion on public lands, injury to park users, and disruption of wildlife migration patterns. *Cf. Hunt v. United States*, 278 U.S. 96, 99-101 (1928); *United States v. Alford*, 274 U.S. 264, 266-67 (1927); *McKelvey v. United States*, 260 U.S. 353, 359 (1922). The court observed that public lands adjacent to the water areas could be exposed

[6] Before the district court, the United States also contended the regulations were a valid exercise of the treaty power and the commerce power. Our holding renders unnecessary any discussion of the applicability of these congressional powers.

to uses, such as hunting, which are expressly proscribed on federal lands within national parks.

In *Camfield v. United States, supra*, 167 U.S. at 525, the Supreme Court emphasized that "[t]he general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case." The National Park Service Act allows the Secretary of the Interior to promulgate "such rules and regulations as he may deem necessary or proper for the use and management of the parks." 16 U.S.C. § 3.[7] The regulations prohibiting hunting and possession of a loaded firearm were promulgated pursuant to that authority, 36 C.F.R. §§ 2.11 and 2.32, and are valid prescriptions designed to promote the purposes of the federal lands within the national park.[8] Under the Supremacy Clause the federal law overrides the conflicting state law allowing hunting within the park.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT

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[7] The fundamental purpose of national parks, including Voyageurs Park, is to "conserve the scenery and the natural historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. *See also* 16 U.S.C. § 160.

[8] Contrary to various contentions by appellant that the regulations prohibiting hunting are unenforceable, these regulations are a proper delegation of congressional authority and founded upon a rational basis. *See United States v. Cassiagnol*, 420 F.2d 868, 872-77 (4th Cir.), *cert. denied*, 397 U.S. 1044 (1970); *Udall v. Washington, Virginia and Maryland Coach Co.*, 398 F.2d 765, 769-70 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969). Such regulations, which are not overbroad or vague, cannot be invalidated merely because they are penal in nature. *See United States v. Grimaud*, 220 U.S. 506, 521 (1911); *United States v. Cassiagnol, supra*, 420 F.2d at 872-77.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARL E. BROWN,

Defendant.

MEMORANDUM AND ORDER

Robert G. Renner, U.S. Attorney, 596 U.S. Courthouse, Minneapolis, MN 55401

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Warren Spannaus, Attorney General for the State of Minnesota, as amicus curiae, by Philip J. Olfelt, Assistant Attorney General and Steven G. Thorne, Special Assistant Attorney General, Department of Natural Resources, 375 Centennial Building, St. Paul, MN 55155

I. *Introduction and Facts*

From a judgment of conviction by a United States Magistrate,* Carl E. Brown has taken a timely appeal to this Court. Rule 8(a) Fed. R. P. for the Trial of Minor Offenses Before United States Magistrates. The review by this Court is the same as an appeal from a judgment of a district court to a court of appeals. Rule 8(d), *supra.*

Because this is a case testing the jurisdiction of the United States to exercise its authority over the water areas within

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* Steven A. Nelson, International Falls, Minnesota.

the boundaries of Voyageurs National Park, there is no dispute concerning the facts which gave rise to this action. On October 7, 1975, Carl E. Brown went duck hunting on a portion of Rainy Lake known as Black Bay in Township 70 North, Range 22 West, Section 12 or 13. His boat was afloat on waters situated within the boundaries of Voyageurs National Park. Specifically, Mr. Brown was cited for violations of National Park Service Regulations prohibiting the possession of a loaded firearm and the hunting of wildlife in national parkways. 36 C. F. R. §§2.11 and 2.32. Mr. Brown concedes and the Magistrate found that he was hunting ducks and, in fact, shot at a passing duck while the Rangers were issuing a citation to him.

The Magistrate found that the United States, as delegated to the Secretary of the Department of Interior, has jurisdiction over the waters within the Park's boundaries and may enforce National Park Service regulations promulgated under that jurisdictional authority. As a result, Carl E. Brown was found guilty of violating the above referenced sections for which the citation was issued. He was sentenced to pay a find of $50.00 for violating 36 C. F. R. §2.11 and $100.00 for violating 36 C. F. R. §2.32.

At his preliminary hearing, Mr. Brown moved the Magistrate's Court for an order dismissing the action because the United States lacked jurisdiction over the waters situated within the Park. The Magistrate, in a Memorandum accompanying his order denying Brown's motion, indicated the Minnesota Legislature had acquiesced in the jurisdictional authority of the United States over the waters although the United States had not acquired any ownership interest in the beds or surface areas. The Magistrate found that the State was an active participant in the creation of the park and that

the activities of the state in passing enabling legislation and otherwise encouraging the development of the Park ". . . can only be consistent with a finding that it intended to cede jurisdiction of the lands within the boundaries of the proposed park to the United States." Magistrate's Memorandum, p. 3, April 26, 1976.

On August 19, 1976, the Court heard oral argument on the issues raised on this appeal. At that time, the State of Minnesota was allowed to participate as amicus curiae because of its avowed sovereign jurisdiction to regulate exclusively the public navigable waters within Voyageurs National Park. A schedule was established for the submission of briefs and the matter was taken under advisement on September 25, 1976.

For the reasons stated below, the Court concludes that the United States does have jurisdiction to regulate the waters in Voyageurs National Park to the extent it is necessary to protect its public lands and to effectuate the purpose for which those lands were acquired and therefore may enforce the regulations prohibiting hunting and the possession of loaded firearms within the park boundaries.

II. *Law*

The United States argues that it has jurisdiction to regulate the waters within Voyageurs National Park under various constitutional powers including the Property Clause, the Commerce clause and the treaty power. It further argues that the State of Minnesota offered jurisdiction, subsequently accepted and perfected by the State, in legislation responding to the national act. The State of Minnesota, with whom Carl Brown concurs, disagrees. It takes the position that the treaty power and commerce clause have no relationship to legislation establishing this or any national park, that the only constitutional basis for such acts is the Property Clause. Further, Minnesota

maintains it never ceded jurisdiction over the waters within the Park's boundaries. As a result, the United States cannot exercise any authority over those waters. Simply stated, Minnesota takes the position that without acquisition of water territory in the Park or absent a cession of jurisdiction from the State, the United States is powerless to extend the jurisdiction of the National Park Service over the waters which are held in trust by the State for the benefit of the citizens of Minnesota.

This Court agrees that Minnesota has not ceded jurisdiction over the waters to the United States. The responding legislation only grants concurrent jurisdiction to the United States over the lands acquired for park purposes by consent of the state. Minn. Stat. §84B.06 (1971). Therefore, this is not a case where a specific grant of jurisdiction, exclusive or otherwise, has been made over territory not acquired by the United States through purchase, donation or condemnation thereby enabling the United States to enforce its regulations over unowned property. *Petersen v. United States*, 191 F.2d 154 (9th Cir. 1951).

It is also not legally sufficient to say that because Minnesota concurred with the United States in the purpose for establishing the park that it intended to cede jurisdiction over the waters to the national sovereign. Minn. Stat. §84B.01, subds. 2 and 3 (1971); 16 U.S.C. §160. Cession statutes are to be strictly construed and it will not be presumed, in the absence of a clearly expressed intent, that a state has relinquished its sovereignty. *Six Cos. v. DeVinney*, 2 F.Supp. 693, 697 (D. Nev. 1933). Assuming an intent from the purpose clause of the Minnesota legislation assumes to much when read with the limited grant of cession in Section 84B.06. Furthermore, this Court cannot assume that retention by the State of jurisdiction over

the waters in the Park would be or is incompatible with the purpose of preserving ". . . the outstanding scenery, geologic conditions, and waterway system which constituted a part of the historic route of the voyageurs. . . ." Minn. Stat. §84B.01, subd. 2 (1971). However, this is not to say that the United States lacks authority over the waters absent a specific cession of jurisdiction by the state. The Court merely finds that Minnesota has not ceded jurisdiction to the United States over the waters by a specific legislative act.

The posture of this case is not unique to the long and often difficult history which has characterized the development of Voyageurs National Park. It is only the most recent occurrence in a long series of events which has pitted local sportsmen against the policies of the National Park Service.

When Senate bill 1962 was introduced and analyzed by the Senate Committee on Interior and Insular Affairs, it contained specific provisions allowing waterfowl hunting and trapping in accordance with the applicable state laws. 1970 U.S. Code Cong. and Adm. News 5965, 5972. However, both the Secretary of the Interior and the Secretary of Agriculture objected to such provisions as inconsistent with longstanding objectives and purposes for which national parks are established.

Walter J. Hickel, Secretary of the Interior, stated:

> "If an area is to be accorded the dignity and statute [sic] of designation as a national park, then many ordinary recreational and commercial influences, including hunting and trapping, must be subordinated to the larger achievement of preservation.
>
> While other avenues of recognition can accommodate such uses, such as a national recreation area, we cannot

support the establishment of a national park which includes recreational or commercial hunting and trapping."

1970 U.S. Code Cong. and Adm. News, *supra*, at 5975.

The situation was similar in the House of Representatives. Whether hunting and trapping would be permitted within a National Park was a focal issue and one which received a thorough airing. The State of Minnesota was made well aware of the intentions of the Subcommittee during the testimony of Governor Harold LeVander.

Congressman Roy A. Taylor, Chairman of the Subcommittee on National Parks and Recreation, told the Governor:

> "It is out. We are either not going to have a park or we are not [sic] going to have hunting and fishing. It is just that simple. I mean hunting and commercial fishing are out. Sport fishing, of course, is permitted in national park areas."

Hearings Before the Subcommittee on National Parks and Recreation of the Committee on Interior and Insular Affairs, House of Representatives on H.R. 10482, 91st Cong., 2d Sess., Serial No. 91-10, p. 359 (1970).

Further along in the proceedings, Congressman Morris Udall of Arizona, presented a summation of the Subcommittee's feelings regarding Minnesota's proposal for hunting in Voyageurs National Park:

> "It should be very clear to you by now—it is certainly clear to me, based on my judgment of this committee—we certainly are not going to have a national park with hunting. This committee is not going to allow it and this dream of a couple of generations for a Voyageurs Park we have in our grasp this year but it is going to go down the drain if hunting is insisted upon. . . You can have one of two things this year with regard to Voyageurs. You

> can have a national park, or we can pass a bill making this a national recreation area."

Hearings, supra, at pp. 366-367.

From the House hearings and the comments from the Departments of Interior and Agriculture, the intent of Congress and the policies of the National Park Service should have been clear to Minnesota. If not, the policies relevant to hunting were manifest when the act creating the park was passed in final form.

The bills in both the House and Senate were amended to delete any mention of hunting privileges and subsequently passed as Public Law 91-661. Under the Act, the Secretary is only required to permit recreational fishing within the Park's boundaries in accordance with applicable laws of the United States and of the State of Minnesota. 16 U.S.C. §160g. In addition, he may, when planning the development of the Park, include provisions for winter sports, the use of snowmobiles, of seaplanes, and the use of all types of watercraft. 16 U.S.C. §160h. Aside from these specific provisions, the Act provides only that the Secretary is to administer the Park in accordance with 16 U.S.C. §§1,2-4. Section 3 of that title allows the Secretary to promulgate necessary rules and regulations for the use and management of the parks consistent with the purpose of national parks, which include the conservation of scenery, natural and historical objects, and wildlife. 16 U.S.C. §1. The regulations at issue here were promulgated under that authority. *See*, 36 C.F.R. §§2.11, 2.32.

As this Court found above, Minnesota, although it lost the battle with Congress in its effort to obtain hunting rights within the boundaries of the park, was careful not to grant blanket legislative jurisdiction over the entire park area to the United States. The State merely granted concurrent juris-

diction over the lands acquired by the Federal Government. The distinction between land and water areas within Voyageurs National Park is no inconsequential difference. There are approximately 139,000 acres of land within the park's boundaries and 80,000 acres of water. Therefore, whether or not hunting is allowed within this national park becomes a matter of immeasurable importance to both sides. Minnesota is concerned about the potential loss of a substantial amount of water area representing traditionally good hunting zones. On the other hand, the United States and the National Park Service is equally concerned about preservation of the park area and protection of these areas from normal commercial and recreational activities, such as hunting and trapping. However, absent a cession of jurisdiction by the state over the water areas, the United States does not acquire derivative legislative powers to exercise its authority over them. *Halpert v. Udall*, 231 F. Supp. 574, 575 (S. D. Fla. 1964); *Collins v. Yosemite National Park Curry Co.*, 304 U.S. 518 (1937); U.S. Const., Art. I, §8, cl. 17.

But while the United States cannot acquire exclusive or partial derivative jurisdiction over areas within a state without the state's consent or cession, the presence or absence of such jurisdiction has nothing to do with its powers under the Property Clause. *Kleppe v. State of New Mexico*, —— U.S. ——, 44 LW 4878, 4882 (1976). In *Kleppe*, the Supreme Court noted that absent consent or cession a state retains jurisdiction even over federal lands subject to federal power under the Property Clause to enact legislation respecting those lands. When Congress acts under that clause, the federal legislation overrides conflicting state laws under the Supremacy Clause. *Kleppe v. State of New Mexico, supra*, at 4882.

The Property Clause of the Constitution provides that "Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, §3, cl. 2. It has been recognized that this clause may be the basis for the establishment of parks on land acquired by the United States. *Yosemite Park & Curry Co. v. Collins*, 20 F. Supp. 1009 (N.D. Cal. 1937).

In the federal legislation establishing Voyageurs National Park, the Secretary of the Interior is given the authority to administer the park according to the provisions of 16 U.S.C. §§1, 2-4. 16 U.S.C. §160f. Section 3 of Title 16 gives the Secretary authority to promulgate rules and regulations "as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service . . ." In making rules and regulations for national parks which are proper for their use and management, the Secretary is guided by the "fundamental purpose" of national parks which is to ". . . conserve the scenery and the natural historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. §1. This purpose is consistent with the specific purpose given for the establishment of Voyageurs National Park. 16 U.S.C. §160. This administrative authority is indeed very broad and necessarily includes the power to promulgate regulations prohibiting activity which may be detrimental to the use of public land within the park. *New Mexico State Commission v. Udall*, 410 F.2d 1197, 1201 (10th Cir. 1969).

Under his authority to regulate the use of park lands, the Secretary has promulgated the regulations which prohibit pos-

sessing loaded firearms and hunting within park areas in order to preserve and protect park areas from what otherwise may be considered normal or recreational uses. 36 C. F. R. §§2.11 and 2.32. By so doing, he has deemed such activity to be an improper use of park property. And under the Property Clause, Congress or its delegates have broad power to regulate public property. In this Court's view, that power certainly includes the authority to prohibit hunting and the possession of loaded firearms on public land within a national park.

This determination, however, does not reach the issue before the Court in this case. The question still remains whether the United States, acting through the Secretary of the Interior and the National Park Service, has the power under the Property Clause to enforce these regulations within the park's boundaries but on territory over which it has not acquired ownership. Under the facts of this case and considering the purpose for which the public lands were acquired, the Court must conclude that hunting may be prohibited on the public waters within Voyageurs National Park.

In *Camfield v. United States*, 167 U.S. 518 (1897), the Supreme Court extended Congressional power under the Property Clause to situations where a certain use of private land interferes with the uses for which the public land was acquired. At issue in that case was a statute which prohibited the enclosure of public lands when no claim of title or property right had been asserted by the party fencing in the public territory. The court intimated that the purpose of the statute was to promote or, at least, allow settlement of unowned lands in Colorado. The Court then noted that Congress passed the statute in response to persons who were building fences on private land but by so doing were effectively enclosing the public land

and thereby preventing intending settlers access to lands which the Government wished to be settled. The Court held:

> "Considering the obvious purposes of this structure, and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance, and that it is within the Constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual. The general Government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all enclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for posturage."

Id., at 525. Although not addressing the issue presented in *Camfield*, the Supreme Court recently stated:

> ". . . *Camfield* holds that the Property Clause is broad enough to permit federal regulation of fences built on private land when the regulation is for the protection of the federal property. *Camfield* contains no limitation on Congress' power over conduct on its own property; its sole message is that the power granted by the Property Clause is broad enough to reach beyond territorial limits."

Kleppe v. State of New Mexico, supra, LW at 4881.

The reach of the Property Clause extends to prohibiting interference with uses of public lands sanctioned by Congress. In *McKelvey v. United States*, 260 U.S. 353 (1972), the High Court said:

"It is firmly settled that Congress may prescribe rules respecting the use of the public lands. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned." *Id.*, at 359.

Here, the regulations prohibiting hunting and the possession of loaded firearms have been deemed necessary in order to preserve the public lands and wildlife within the park. Because duck hunting usually occurs within close proximity of adjacent land areas, such activity on adjoining water areas would substantially interfere with the use of these public lands. The potential for invasion of adjacent public lands contrary to the purpose for which they were acquired by the United States is great indeed. Ducks may be shot over the public lands and pellets from discharging guns may rain upon the public territory and, not inconceivably, cause injury to other park users. Additionally, the infusion of a hunting element into the park areas could cause disruption of the wildlife patterns in the park contrary to the purpose of unimpaired preservation. During the hunting season, normal duck migration patterns may be changed and other wildlife may be scattered in an abnormal manner within the park. Finally, the presence of a potentially great number of additional people during a hunting season may cause a substantially greater burden on the adjacent park land than what was originally envisioned. Only in theory could duck hunting be done entirely on the waters. In reality, the adjacent public lands would be exposed to depredation and uses which are prohibited on public land within national parks.

Carl Brown was cited for certain violations while on public waters held by the State of Minnesota for the benefit of its citizens. However, his location on the Black Bay waters was immediately adjacent to public lands within the park. Al-

though his location has not been specifically ascertained, the Court finds he was on waters within Section 12 or 13 of Township 70, Range 22 West. In either section, the surrounding land areas have been acquired by the United States for park purposes. Because hunting is prohibited on these lands; there is no doubt in this Court's mind that duck hunting on the contiguous water areas represents a significant interference with the normal use of the public park lands and, as such, is a nuisance which the Park Service may prohibit in order to protect these lands and preserve them according to the purposes for which they were acquired. *Camfield v. United States, supra*, at 525.

Where the State's laws conflict with the hunting and firearms regulations of the National Park Service, promulgated pursuant to authority originally from the Property Clause, the local laws must recede. *Kleppe v. State of New Mexico, supra*, 44 LW at 4882. Therefore, the regulations prohibiting hunting and loaded firearms within national parks may be enforced in this case.

The fact that the National Park Service regulations prohibiting hunting and loaded firearms within the park do not apply to privately owned land within the park does not affect the authority of the United States to regulate hunting on contiguous public waters. *See*, 36 C. F. R. §§1.1(b). The Property Clause gives Congress authority to regulate the waters for the protection of the park lands and to prevent interference with the purpose for which the lands were acquired. For policy reasons unknown at this time, the Secretary has decided not to regulate these activities on private lands. Declining to exercise valid authority is distinguishable from the power which is the basis of the regulatory authority itself. If the Property Clause limited governmental authority to only those lands it

actually acquired, as the State of Minnesota argues, the provision which makes the regulations inapplicable to privately owned land would be unnecessary. In fact, the *Camfield* decision and its progeny stand for a contrary view and one which provides an explanation for the necessity of including a specific exemption for private lands. *See also, McKelvey v. United States*, 260 U.S. 353 (1922); *United States v. Alford*, 274 U.S. 264 (1927); *Hunt v. United States*, 278 U.S. 96 (1928). The exemption for private lands, in any case, does not apply to public navigable waters.

This Court has learned that of the approximately 139,000 acres within the park's boundaries, only about 26,000 acres remain in private hands. The Park Service intends to acquire these remaining acres by the end of fiscal year 1978 and therefore the exemption for private lands will then have no meaningful effect within Voyageurs National Park.

The Court, however, specifically declines to decide whether all the regulations of the Park Service which are or may be applicable to water areas not owned by the United States, but which are within the park's boundaries may be enforced under the authority of the Property Clause. It is only where, as here, certain commercial or recreational activities signficantly interfere with the use of the park and the purpose for which it was established that this Court would agree the United States has authority to regulate the activities on territory over which it has neither acquired ownership nor a grant of jurisdiction from the state. The significant interference found here involves the potential threat of depredation to the public lands and injury to park uses from activity expressly prohibited on public parklands.

The United States, as noted earlier, has argued alternative grounds upon which it may have jurisdiction over unowned

water areas within the park. The Court does not believe it necessary in light of its holding today, or appropriate under the facts presented, to reach the merits of those arguments.

For the reasons stated, the judgment of the Magistrate is hereby affirmed but modified to conform with this opinion.

IT IS SO ORDERED.

Dated: Nov. 4, 1976.

MILES W. LORD
United States District Judge

DOCKET ENTRIES DISTRICT COURT

10-7-75 — 1. VIOLATION NOTICE NO. 054022, issued 10-7-75 by National Park Service Rangers in the Black Bay area of Voyageurs National Park: Mandatory hearing scheduled before Magistrate Steven Nelson at International Falls, Minnesota for October 9, 1975 at 1:00 P.M.

10-9-75 — 2. CONSENT TO BE TRIED BY U. S. MAGISTRATE, signed and filed in triplicate.

1-26-76 — 3. NOTICE OF APPOINTMENT OF ASSOCIATE COUNSEL, filed by defendant. Defendant appoints and designated Attorney William W. Essling, 828 Minnesota Building, St. Paul, Minnesota 55101 as associate counsel.

4-26-76 — 4. ORDER AND MEMORANDUM (Nelson, Magistrate).

* * * * *

A true copy in two sheets Certified July 26, 1976.

By BARBARA M. REDPATL
Deputy Clerk

4-26-76 — 4. (Con't)

2). That the Defendant, Carl E. Brown, shall appear before the Court at 1:30 P.M. on Thursday, May 6, 1976,

to enter a plea of Guilty or Not Guilty to the charges currently pending against him.

5-28-76 — 5. FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT (Nelson, Magistrate)

* * * * *

6. JUDGMENT (dated 7/25/76 at Duluth, Minnesota)

5-28-76 — 7. ORDER FOR SENTENCING (Nelson, Magistrate):

1. For violating 36 CFR 2.11, the Defendant is Ordered to pay a fine in the amount of $50.00.

2. For violating 36 CFR 2.32, the Defendant is Ordered to pay a fine in the amount of $100.00.

Imposition of sentence is stayed pending the appeal of the instant case to the Federal District Court pursuant to a Notice of Appeal dated and filed by the Defendant on the 28th day of May, 1976.

FURTHER ORDERED: that in the event the reviewing Court shall uphold the conviction of the Defendant, the fines shall be payable to the Clerk of United States Federal District Court, Federal Court House, Duluth, Minnesota 55802, ten days (10) following final determination.

5-28-76 — 8. NOTICE OF APPEAL by Defendant, as to Orders entered on May 28, 1976.

FORWARDED ENTIRE FILE TO JUDGE LORD, 684 U. S. COURTHOUSE, MINNEAPOLIS, MINNESOTA MAILED CERTIFIED COPY OF DOCKET SHEET TO JUDGE LORD AND TO U. S. ATTY, WILLIAM ESSLING, ESQ., AND JOHN D. FURUSETH. This will serve as notice of all filings in this case as well as Notice that appeal has been filed and forwarded to be set on Judge Lord's calendar.

(Caption)

ORDER

The above entitled action came on for preliminary hearing on October 16, 1975, before the undersigned, a United States Magistrate, upon the Defendant's written consent to be tried by a United States Magistrate, at the Municipal Court Room, Municipal Building, International Falls, Minnesota. The Defendant, Carl E. Brown, appeared in person and by his attorney, John D. Furuseth, 212 Fourth Avenue, International Falls, Minnesota. The United States was represented by United States Attorney Robert G. Renner. The Defendant moved for a dismissal of the charges brought against him on the grounds that the United States was without jurisdiction. Upon oral and written argument of counsel and upon all filings and proceedings had herein, IT IS HEREBY ORDERED:

1. That the Defendant's motion to dismiss is denied and it is the finding of this Court that the United States has jurisdiction over the lands and waters lying within the boundaries of the Voyageur's National Park, as prescribed by Congress, and may enforce regulations issued by the Secretary of the Interior.

2. That the Defendant, Carl E. Brown, shall appear before the above-named Court in Koochiching County Court House, International Falls, Minnesota, at 1:30 P.M. on Thursday, May 6, 1976, to enter a plea of Guilty or Not Guilty to the charges currently pending against him.

IT IS FURTHER ORDERED, that a copy of this Order and the attached Memorandum be served upon the Attorneys appearing herein and upon William W. Essling, Attorney at Law,

828 Minnesota Bldg., St. Paul, Minnesota as Co-Counsel for the Defendant.

STEVEN A. NELSON
United States Magistrate

Dated this 26th day of April, 1976.

(Caption)

MEMORANDUM

The Defendant appeared before this Court on a special appearance for the purpose of challenging the jurisdiction of the United States to enforce regulations promulgated by the National Park Service. These regulations, set forth at 36 CFR 2.11 and 2.32 prevent the use of firearms and the hunting of wild life within a National Park. The facts, as stipulated by the Defendant and his attornies, are as follows:

On October 7, 1975, the Defendant was hunting ducks with the use of a loaded fire arm in the Black Bay area of Rainy Lake, Minnesota. He was in a boat afloat on the waters of Rainy Lake and was situated within the boundaries of Voyageur's National Park. He was observed by employees of the Park Service and was subsequently issued citations alleging violations of 36 *CFR* 2.11 (a) and 36 *CFR* 2.32 (a)(1).

The Defendant brought a motion to dismiss the criminal charges filed against him on the grounds that the United States government, acting through the National Park Service, does not have jurisdiction to regulate the use of firearms, or the practice of hunting, in the Black Bay area of Rainy Lake. The Defendant aptly argued that the Federal government does not in fact own the "waters" as they are distinguished from the "lands" within the boundaries of Voyageur's National Park, and the parties have devoted a substantial amount of time to a discussion of who in fact owns these waters. The law,

as gleaned from the Federal Acts and the Statutes of the State of Minnesota, as interpreted by reference to their legislative history, gives rise to ambiguity on this point. The Court, however, does not believe that determination of this issue is required to dispose of the case at bar.

There is no serious dispute that the State of Minnesota could surrender jurisdiction over the waters in question even though it did not convey ownership of these waters to the United States. *Peterson v. United States*, 191 F2d 154 (9th Cir. 1951). Therefore, the precise issue before this Court is whether the State of Minnesota has conveyed jurisdiction over these waters to the United States.

On January 8, 1971, the United States Congress enacted Public Law 91-661, 84 *Stat.* (1970), which provided for the establishment of Voyageur's National Park, 16 *USC* 160, 160 (a-k). The Act further provided:

> The park shall include the lands and waters within the boundaries as generally depicted on the drawing entitled "A Proposed Voyageur's National Park, Minnesota," numbered LNPMW-VOYA-1001, dated February, 1969, which shall be on file and available for public inspection in the offices of the National Park Service, Department of the Interior.

The legislative history surrounding the above enactment suggests that Congress was aware of the fact that the proposed boundaries of the park included 139,000 acres of land and 80,000 acres of water. The COMMITTEE ON INTERIOR AND INSULAR AFFAIRS further noted that "those lakes and the network of connecting waterways make this area a unique and beautiful setting for a National Park" USCCAN 91st Congress, 2nd Sess. p. 5965.

Minnesota Statutes Section 84B.06 provides:

> Consent of the State of Minnesota is given to the acquisition by the United States in any manner authorized by act of Congress of lands lying within the boundaries of Voyageurs National Park for any purpose incident to the development and maintenance of the park, subject to concurrent jurisdiction of the State and the United States as defined in Minnesota Statutes, Section 1.041.

The State, by reference to the above statute, made no objection to the Federal Act, and was in fact an active participant in the creation of the park. The activities of the State under these circumstances can only be consistent with a finding that it intended to cede jurisdiction of the lands within the boundaries of the proposed park to the United States.

The Legislative findings, as set forth at *Minn. Stat.* 84B.01 (2), provides that, among others, the purpose of the park is "to preserve, for the inspiration and enjoyment of present and and future generations, the outstanding scenery, geologic conditions, and waterway system which constituted a part of the historic route of the voyageurs, who contributed significantly to the opening of the northwestern United States." Direct reference is herein made to the "waterway system" which adds additional support for the exercise of Federal jurisdiction over the lands and waters within the park boundaries.

IT IS THE FINDING OF THIS COURT that there is adequate law and evidence to support the proposition that the Federal Government and the State Legislature worked in concerted effort to establish the Voyageur's National Park. Although no precise finding is made relative to the actual ownership of the waters lying within the boundaries of the Park, I find that Congress has acted to extend jurisdiction

over the entire area within the Park boundaries. The Defendant's conduct admittedly took place within the confines of the Voyageur's National Park, and therefore it must be concluded that the regulations promulgated by the Park Service are controlling. These Federal regulations take priority over conflicting State law. *Peterson v. United States*, 191 F2d 154 (9th Cir. 1951); *Sperry v. State of Florida*, 373 U.S. 379, 83 S. Ct. 1322, 10L Ed 2d 428 (1963).

To find otherwise would be contrary to available law and existing legal precedent. It would create a ludicrous paradox of split jurisdiction, and would deny either the State of Minnesota or the Federal Government the ability to enforce their respective laws and regulations with uniformity. The clear and decisive acts of Congress indicate that it was their intention to establish a National Park, subject to the regulations here in issue. The State Legislature ceded to concurrent Federal jurisdiction so that the overall plan and intent may be implimented.

April 26, 1976.

STEVEN A. NELSON
United States Magistrate

Constitution of the United States, Article 4, Sec. 3, Cl. 2 (Property Clause):

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

16 U.S.C. 3

3. Same; rules and regulations; timber; leases

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this section and sections 1, 2 and 4 of this title shall be punished by a fine of not more than $500 or imprisonment for not exceeding six months or both, and be adjudged to pay all costs of the proceedings.

FEDERAL REGISTER VOL. 40, NO. 68
TUESDAY, APRIL 8, 1975

VOYAGEURS NATIONAL PARK, MINNESOTA

Notice of Establishment

Whereas, more than 34,000 acres of land, including all land required to be donated by the State of Minnesota, are now under the ownership of the United States and under the administrative jurisdiction of the National Park Service within the boundaries of Voyageurs National Park, as the boundaries are set forth in section 102 of the act of January 8, 1971 (84 Stat. 1971), and the acreage so acquired, in my opinion, is efficiently administrable to carry out the purposes of such act.

Now, therefore, I Rogers C. B. Morton, Secretary of the Interior, hereby give notice of the establishment of Voyageurs National Park, such establishment to become effective on April 8, 1975.

The boundaries of the National Park, which encompass an area generally identical to that described in section 102 of the act of January 8, 1971, supra, are located in St. Louis and Koochiching Counties, Minnesota, and are more particularly described as follows:

Voyageurs National Park
St. Louis County
4th Principal Meridian

(Descriptions as per statute omitted in this printing.)

These boundaries may be revised from time to time by the publication in the Federal Register of a revised drawing or other boundary description as provided in section 102 of the act of January 8, 1971, supra.

Voyageurs National Park shall be administered in accordance with the act of January 8, 1971, supra., and in accordance with the act of August 25, 1916 (39 Stat. 535) as amended and supplemented (16 U.S.C. 1-4).

ROGERS C. B. MORTON
Secretary of the Interior

(FR Doc. 75-9288 Filed 4-7-75; 9:48 a.m.)

WATER RESOURCES CONSERVATION

Minn. Stat. Ann.

105.37 Definitions

Subdivision 1. Unless the language or context clearly indicates that a different meaning is intended, the following words and terms, for the purposes of sections 105.37 to 105.55, shall have the meanings subjoined to them.

Subd. 2. "Commissioner" means the commissioner of natural resources of the state of Minnesota.

* * * * *

Subd. 3.

Subd. 4.

Subd. 5.

Subd. 6. "Beneficial public purpose", in relation to waters of the state, includes but is not limited to any or all of the following purposes:

* * * * *

(e) Recreational activities such as swimming, boating, fishing, and hunting;

(f) Public navigation other than for recreational purposes;

* * * * *

Subd. 7. "Waters of the state" means any waters, surface or underground, except those surface waters which are not confined but are spread and diffused over the land. "Waters of the state" includes all boundary and inland waters.

105.38 Declaration of policy

In order to conserve and utilize the water resources of the state in the best interests of the people of the state, and for the purpose of promoting the public health, safety and welfare, it is hereby declared to be the policy of the state:

(1) Subject to existing rights all waters of the state which serve a material beneficial public purpose are public waters subject to the control of the state. In the determination of whether a beneficial public purpose exists, specific evidence of the present or future beneficial public purpose shall be evaluated in accordance with section 105.37, subdivision 6, and with reference to the existing land use of the area, the soil types surrounding and underlying the water, the ownership of the land surrounding the water, the relative agricultural and wildlife productivity of the area, and relevant provisions of a county or municipal shorelands ordinance enacted pursuant to section 105.485. The public character of water shall not be determined exclusively by the proprietorship of the underlying, overlying, or surrounding land or on whether it is a body or stream of water which was navigable in fact or susceptible of being used as a highway for commerce at the time this state was admitted to the union. * * *

Minn. Stat. Ann.—SOVEREIGNTY, JURISDICTION

1.042 Consent of state

Subdivision 1. Given for certain purposes. The consent of the State of Minnesota is hereby given in accordance with the Constitution of the United States, Article I, Section 8, Clause 17, to the acquisition by the United States in any manner of any land or right or interest therein this state required for sites for customs house, courthouses, hospitals, sanatoriums, post-offices, prisons, reformatories, jails, forestry depots, supply houses, or offices, aviation fields or stations, radio stations, military or naval camps, bases, stations, arsenals, depots, terminals, cantonments, storage places, target ranges, or any other military or naval purpose of the United States.

Subd. 2. Jurisdiction ceded to United States. So far as jurisdiction, exclusive or partial, in or over any land or place in this state now owned or hereafter acquired by the United States for any purpose specified in subdivision 1 heretofore has been accepted or hereafter is accepted by the head or other authorized officer of any department or independent establishment or agency of the United States as provided by the laws of the United States, such jurisdiction is hereby ceded to the United States, subject to the conditions and reservations of subdivision 3. When the premises abut upon the navigable waters of this state, such jurisdiction shall extend to and include the underwater lands adjacent thereto lying between the line of low-water mark and the bulkhead or pierhead line as now or hereafter established.

1.043 Jurisdiction, when to vest

The jurisdiction granted or ceded to the United States over any place in the state under section 1.041 or section 1.042 shall not vest until the United States has acquired the title to or right of possession of the premises affected, and shall continue only while the United States owns or occupies the same for the purpose or purposes to which such jurisdiction appertains as specified in those sections.

1.046 Evidence of consent

The consent of the state given by or pursuant to the provisions of sections 1.041 to 1.048 to the acquisition by the United States of any land or right or interest therein in this state or to the exercise of jurisdiction over any place in this state shall be evidenced by the certificate of the governor, which shall be issued in duplicate, under the great seal of the state, upon application by an authorized officer of the United States and upon proof that title to the property has vested in the United States. The certificate shall set forth a description of the property, the authority for, purpose of, and method used in acquiring the same, and the conditions of the jurisdiction of the state and the United States in and over the same, and shall declare the consent of the state thereto in accordance with the provisions of sections 1.041 to 1.048, as the case may require. When necessary for proper identification of the property a map may be attached to the certificate, and the applicant may be required to furnish the same. One duplicate of the certificate shall be filed with the secretary of state. The other shall be delivered to the applicant, who shall cause the same to be recorded in the office of the register of deeds of each county in which the land or any part thereof is situated.

Minn. Stat. Ann.—CHAPTER 84 B. VOYAGEURS NATIONAL PARK [NEW]

84B.01 Legislative findings

Subdivision 1. History of efforts to establish. The legislature finds that the untiring efforts of citizens of the state of Minnesota, first formally enunciated by the legislature in 1891 by concurrent resolution number 13, together with efforts of citizens of other states, have culminated in the enactment by the second session of the 91st Congress of an act authorizing the establishment of Voyageurs National Park in the state of Minnesota; (Public Law 91-661).

Subd. 2. Purpose of park. The legislature concurs with the stated purpose of Congress in authorizing the establishment of the park. It is, therefore, the purpose of sections 84B.01 to 84B.10 to preserve, for the inspiration and enjoyment of present and future generations, the outstanding scenery, geologic conditions, and waterway system which constituted a part of the historic route of the voyageurs, who contributed significantly to the opening of the northwestern United States.

Subd. 3. Public interests served by establishment of the park. Sections 84B.01 to 84B.10 are a necessary first step in the establishment of the park and is in furtherance of the provisions of section 101 of the act of Congress authorizing the establishment of the park. The Voyageurs National Park will be the largest park area within the state and will be of especial and immediate benefit to the citizens of the state, due to its accessibility to them, and to the effect it may reasonably be expected to have on the development of tourism and related economic activities. Sections 84B.01 to 84B.10 will, therefore, promote the health and welfare of the citizens of the state of Minnesota.

Laws 1971, c. 852, § 1.

84B.03 Donation of state lands

Subdivision 1. Governor's duties. Notwithstanding the provisions of any other law to the contrary, the governor, after consulting with the commissioner of natural resources and, in regard to lands forfeited to the state for nonpayment of taxes and held in trust by the state for taxing districts, the commissioner of revenue, shall donate and convey to the United States of America the state's interest in all of the following lands lying within the boundaries of Voyageurs National Park, as described by section 102 of the act of Congress authorizing the establishment of the park: (1) trust fund lands; (2) lands forfeited to the state for nonpayment of taxes and held in trust by the state for taxing districts; and (3) other lands acquired or otherwise owned by the state. Each conveyance of these lands shall contain the following: (1) a provision that the lands shall revert to the state of Minnesota if (a) the secretary of the interior does not establish the park within five years after donation of all state owned lands, or if (b) the lands so conveyed are no longer used for national park purposes; (2) a reservation to the state of all minerals and water power rights; (3) a provision that the conveyance is subject to the rights of any person having an interest in the land on the date of conveyance pursuant to state lease, license, or permit; and (4) to satisfy the provisions of section 301(c) of the act authorizing the establishment of Voyageurs National Park, each conveyance of these lands also shall contain the convenant required by that section to prohibit mining or water power development.

84B.06 State's consent to acquisition of lands

Consent of the state of Minnesota is given to the acquisition by the United States in any manner authorized by act of Congress of lands lying within the boundaries of Voyageurs

National Park for any purpose incident to the development and maintenance of the park, subject to concurrent jurisdiction of the state and the United States as defined in Minnesota Statutes, Section 1.041.

Laws 1971, c. 852, § 6.

84B.10 Environmental protection

Before any lands are conveyed to the United States pursuant to sections 84B.01 to 84B.10, the state shall enter into a written agreement with the secretary of the interior or his designee pursuant to which the parties agree to cooperate to maintain in the park the highest standards relating to air, land, and water quality, whether these highest standards be state or federal, consistent with the lawful authority possessed by the state of Minnesota and the secretary of the interior in his administration of the national park system to maintain air, land, and water quality in the park.

Laws 1971, c. 852, § 10.

EXHIBIT "C"

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

COMMISSIONER'S ORDER NO. 1947

REGULATIONS PROHIBITING HUNTING AND TRAPPING IN VOYAGEURS NATIONAL PARK

WHEREAS, the Voyageurs National Park has been established by the Secretary of the United States Department of the Interior pursuant to authority granted him by Public Law 91-661; and

WHEREAS, Congress did not exempt Voyageurs National Park from National Park rules which prohibit public hunting or trapping on federally-owned property in national parks; and

WHEREAS, the State of Minnesota, which unsuccessfully urged Congress to adopt a contrary policy during hearings on bills relating to Voyageurs National Park, now concurs in the action taken by Congress; and

WHEREAS, State land transfer legislation (Laws of Minnesota 1971, Chapter 852) provided for the donation of more than 37,000 acres of State and County lands to the United States for inclusion in the park, but neither that nor any other State legislation ceded to the United States any jurisdiction over the waters within the park boundaries; and

WHEREAS, in the absence of any such cession, the State, which owns much of the water area within the park boundaries in trust for the people of Minnesota, retains its full jurisdiction over public waters within said boundaries, including the jurisdiction to regulate hunting, trapping and fishing thereon;

NOW THEREFORE, pursuant to the authority vested in me by law, I, Robert L. Herbst, Commissioner of Natural Resources, hereby prescribe the following regulation prohibiting hunting and trapping in Voyageurs National Park with the exception of Black Bay.

Section 1. The hunting and trapping of all wild animals is prohibited until further order of the Commissioner in the following described area:

All lands and waters within the boundaries of Voyageurs National Park as shown on the attached National Park Service Map labeled LNPMW-VOYA-1001 and dated February, 1969, with the exception of the waters of that portion of Black Bay, Rainy Lake, in Sections 7 and 18 of Township 70 North, Range 21 West, and Sections 12 and 13 of Township 70 North, Range 22 West.

Dated at Saint Paul, Minnesota, this 13th day of August, 1976.

ROBERT L. HERBST
Commissioner, Department of
Natural Resources

APPROVED AS TO FORM AND EXECUTION

WARREN SPANNAUS
Attorney General

C. PAUL FARACI
Deputy Attorney General
Department of Natural
Resources

IN THE

Supreme Court of the United States

October Terms 1976

No. 76-1493

CARL E. BROWN,

Petitioner,

vs.

UNITED STATES,

Respondent.

BRIEF FOR THE STATES OF MINNESOTA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR THE STATES OF MINNESOTA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is submitted pursuant to U. S. Sup. Ct. Rule 42(4) in support of the petition of Carl E. Brown for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *United States v. Brown*, No. 76-2017 (8th Cir., rehearing den. April 19, 1977).

QUESTION PRESENTED

Do regulations promulgated on the authority of the Property Clause by the Secretary of the Interior for the governance of national parks have any effect outside of federally-owned lands and waters in Voyageurs National Park absent an affirmative cession of jurisdiction by the State of Minnesota?

INTEREST OF AMICI CURIAE

Voyageurs National Park, an area of some 219,000 acres, lies entirely within the State of Minnesota. A significant portion of this area consists of lakes and streams,[1] which are in no way property of the United States. Likewise, of the land area of the park a significant portion remains in private hands.[2]

The State of Minnesota has never ceded to the United States any of its sovereign jurisdiction over any part of the area inside the park boundaries. Eighth Cir. Op. at 5-6; Memorandum of the Dist. Ct. at 3. Yet the United States Park Service has taken the position that its general regulations for the governance of National Parks (36 C.F.R. c. 1), which include the hunting prohibition at issue here, apply not only on lands owned by the United States inside the park, but on public, navigable waters as well, regardless of whether the state has ceded jurisdiction. The instant case lends support to this position.

The negative impact of this position on the States of Minnesota and Wisconsin, as well as on the many other states similarly situated, is apparent. If the United States is correct, it may acquire general police powers over portions of a state by the relatively simple device of securing a congressional declaration that a particular area within the State is a national park, national monument, national lakeshore, or any of a myriad of similar federal areas. No longer will it be necessary to achieve this goal by the traditional means of either persuading Congress to appropriate money to purchase interests in the lands or waters over which the United States wishes to

[1] The Court of Appeals found that the park contains approximately 139,000 acres of land and 80,000 acres of water. 8th Cir. Op. at 3.

[2] At the time of the decision by the District Court (Nov. 6, 1976), 26,000 acres remained in private ownership. Memorandum of the Dist. Ct. at 11.

exert a measure of federal police power or convincing a state legislature to cede legislative jurisdiction.

Apparently the only limit on this new, simpler, and cheaper method of extending federal jurisdiction advocated by the United States would be that the United States own at least some land in the area. This at least would be necessary to support the fiction that this federal power derives from the Property Clause.[3]

To the extent that the United States is permitted to exercise such powers, the states are pre-empted. Although the powers of the United States and the State would be nominally concurrent, any federal regulations would supersede any conflicting state regulations. The powers of the State would be subordinated to the powers of the United States.

The instant case is an excellent example of how in this way state jurisdiction can be supplanted by an aggressive federal government. The State of Minnesota long supported the establishment of a national park in the State.[4] The efforts of interested Minnesotans were instrumental in securing the introduction and passage of the Voyageurs National Park Act, 16 U.S.C. §§ 160-160k. And it is undeniable that without the subsequent *donation* by the State of approximately one-fourth of the land area of the park, at a cost to itself of some five million dollars, the park would not exist today. See 16 U.S.C. § 160a.

Following establishment of the park, the State's interest in and dedication to the park continued. The Commissioner of Natural Resources, for example, prohibited "the hunting and

[3] U. S. Const., Art. IV, § 3, cl. 2.

[4] In 1891 the Minnesota Legislature adopted Concurrent Resolution No. 13 urging Congress to establish a national park in the Rainy Lake - Lake Kabetogama area.

trapping of all wild animals" within the boundaries of Voyageurs National Park, except on the waters of a tiny portion of Black Bay of Rainy Lake.[5] Commissioner's Order No. 1947, Petitioner's Appendix at A-40 to A-41.

However, in spite of the State's long-term commitment to the park, the Park Service would deny the State any meaningful role in its management. Not satisfied with a cooperative approach to the management of the area, an approach which has worked well for many years in the nearby Boundary Waters Canoe Area of the Superior National Forest,[6] the National Park Service has asserted jurisdiction over public navigable waters inside Voyageurs National Park to the preemption of state jurisdiction.

In summary, the sovereign governmental interests of the States of Minnesota and Wisconsin are directly and adversely affected by this decision. It effectively deprives the State of Minnesota and its people of any direct means of influencing the development and management of an area which has considerable importance to both. The decision is contradictory to the traditional position taken by the United States in the neighboring Boundary Waters Canoe Area. The fundamental question here is not Carl E. Brown's innocence or guilt, but the relative jurisdictions of the State and Federal Governments and the proper relationship of these two elements of our federal system.

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[5] The intended location of the park boundary in this area has been the subject of considerable confusion and dispute. Both former Governor Anderson and present Governor Perpich have requested Congress and the Secretary of the Interior to resolve the matter.

[6] This relationship may very well, be jeopardized if the decision here is allowed to stand, but until now the State has regulated activities on the waters of the Boundary Waters Canoe Area and the United States has regulated activities on federal land. The United States has traditionally recognized the State's jurisdiction over the waters of the Boundary Waters Canoe Area. Language of cession in relation to the Boundary Waters Canoe Area of the Superior National Forest (Minn Stat. § 1.045 (1976)) is identical to language of cession in relation to Voyageurs National Park (Minn. Stat. § 84B.06 (1976)).

REASONS FOR GRANTING THE WRIT

I. THE ISSUES RAISED IN THIS CASE ARE OF MAJOR IMPORTANCE TO EVERY STATE THAT CONTAINS A NATIONAL PARK OR SIMILAR FEDERAL AREA ADMINISTERED BY THE UNITED STATES UNDER ITS PROPRIETARY JURISDICTION.

There are 287 units in the national park system.[7] United States Department of the Interior, *Index of the National Park System* at 12-13 (1975). They are scattered throughout the United States and their statutory outer boundaries encompass some 31,000,000 acres of land and water. *Id.* The United States may or may not own all of the area inside the boundaries of a particular unit,[8] yet according to the House committee report accompanying a recent amendment (Pub. Law. No. 94-458) to the basic statutes governing the national park system:

> Most National Park System areas are subject to proprietorial jurisdiction wherein the agency has only the rights of any landowner.

H. Rep. No. 94-1569, 94th Cong. 2nd Sess., U.S. Code Cong. and Adm. News 4714, 4715. A similar statement appears in the Senate Report:

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[7] The "national park system" is defined to "include any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park monument, historic, parkway, recreational, or other purposes." 16 U.S.C. §1c(a).

[8] Excluding Big Cypress National Preserve, Big Thicket National Preserve, Cuyahoga National Recreation Area, and Grand Canyon National Park, which together contain a gross area of 1,400,000 acres, but for which federal and non-federal acreages are not available, the system contains 27,788,724 federal and 1,429,430 non-federal acres. *Id.*

> The majority of the areas of the National Park System are presently administered under proprietorial jurisdiction with approximately 36 areas administered by exclusive legislative jurisdiction.

The question of the extent to which this proprietorial jurisdiction applies to lands and waters which, although inside a unit of the national park system, are not owned by the United States, is thus of fundamental and major significance to many states. It is also a question of serious import to the relationship of federal and state governments in our federal system. And, like the issue in *United States v. Coleman*, 390 U.S. 599, 601 (1968), this question is important to the utilization and management of the public lands.

II. THE QUESTION PRESENTED BY THIS COURT HAS NOT HERETOFORE BEEN DECIDED BY THIS COURT.

Previous decisions by this Court have established that by acquiring title to lands or waters the United States gains a degree of legislative power over such property measured by the needs of the "governmental purposes for which the property was acquired." *James v. Dravo Contracting Co.*, 302 U.S. 134, 147 (1937). This federal power derives from the Property Clause (*Id.*), and encompasses certain powers over wildlife located within the boundaries of the federal property. *Kleppe v. New Mexico*, —— U.S. ——, 96 S.Ct. 2285 (1976); *Hunt v. United States*, 278 U.S. 96 (1928).

Furthermore, although the powers flowing from the Property Clause may in some limited circumstances reach beyond the boundaries of the federal property to prohibit certain nuisance-like activities that threaten such property (*Camfield v. United States*, 167 U.S. 518, 525 (1897); *United States v. Alford*, 274 U.S. 264 (1927)), this Court, as it recognized in *Kleppe v. New Mexico*, *supra*, at 2295, has never determined "the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands" or, indeed anywhere other than on its own property.

As the Court of Appeals concluded, however, "the instant case presents the question left open in *Kleppe*." 8th Cir. Op. at 7. It is a serious constitutional question of far-reaching consequence. The States of Minnesota and Wisconsin firmly believe that this Court ought to resolve it.

III. THE DECISION OF THE COURT OF APPEALS GOES FAR BEYOND THE PRINCIPLES ENUNCIATED BY THIS COURT IN PREVIOUS DECISIONS INVOLVING EXTRATERRITORIAL APPLICATIONS OF THE PROPERTY CLAUSE.

On just three occasions has this Court considered the application of federal statutes or regulations adopted under the Property Clause to areas outside federal property. *United States v. Alford*, *supra*; *Colorado v. Toll*, 268 U.S. 228 (1928); and *Camfield v. United States*, *supra*.[9] *Toll* must be considered to state the general rule and the other two decisions to state exceptions to that rule.

Toll is the only one of the three that involved Park Service regulations. There, the Park Service had attempted to regulate the use of state and county highways by "automobile . . . carrying pasengers who are paying . . . for the use of the machines." *Id.* at 229. The State of Colorado argued that such

[9] *McKelvey v. United States*, 260 U.S. 353 (1922), is sometimes cited as a fourth case, but although it mentions *Camfield* and involves the same statute, the wrongful act occurred on federal land. *Id.* at 355-56.

regulations could not apply to state and county highways "without an act of cession from it and an acceptance by the national government." *Id.* at 231. The district court had dismissed the state's action, but this Court reversed, noting that "[t]he cases cited for the defendant do not warrant any such extension of the power of the United States over land within a State." *Id.* The matter was thereupon remanded to the district court to determine whether there had been, as alleged by the United States, a "cession from the State." *Id.* at 231-32. *Cf. Arthur v. Fry,* 300 F. Supp. 622, 626 (E. D. Tenn. 1969), where the state had conveyed its title to the roads in Great Smokey National Park with only a reservation of the right of public use.

As a general rule, then, the Property Clause does not empower the United States to exercise jurisdiction over areas it does not own. This is hardly surprising since it is "obvious" that "the Property Clause is a grant of power only over federal property." *Kleppe v. New Mexico, supra,* at 2291. To the extent there are exceptions from this general rule, they must be found in either *Camfield* or *Alford.* But neither of those decisions goes further than to recognize that Congress may have a limited right to legislate the abatement of *nuisances* existing or occurring adjacent to federal property where necessary to prevent the destruction of federal property (*Alford*) or the monopolization of its use (*Camfield*).

In *Camfield* the question was whether a federal statute prohibiting the enclosure of federal lands could be applied to prevent the construction of a fence "a few inches inside" adjacent private lands. The fence was clearly an "evasion" of the law and was "manifestly intended to enclose the government's lands." *Camfield v. United States, supra* at 525. The *Camfield* Court considered this fence to be the sort of "aggressive annoy-

ance of one neighbor by another" (*Id.* at 523) normally considered to be a private nuisance. According to the Court:

> Considering the obvious purposes of this structure, and the necessities of preventing the inclosure of public lands, we think the fence is *clearly a nuisance,* and that it is within the power of Congress to order its *abatement,* notwithstanding such action may involve an entry upon the lands of a private individual.

Id. at 525. (Emphasis added.)

An identical situation existed in *United States v. Alford, supra,* except that there, instead of a fence, the nuisance prohibited by federal law consisted of the failure to extinguish a fire on private lands near "forest timber or other inflammable material" on adjacent federal land. On the authority of *Camfield* the Court concluded that the Property Clause provides Congress with sufficient authority to protect federal property from the threat of destruction by fire originating on adjacent non-federal lands.

But the Court of Appeals decision here goes far beyond the limited kinds of defensive regulations upheld in either *Camfield* or *Alford.* The instant decision permits the Park Service to regulate an activity (hunting) everywhere inside a 219,000 acre park without any kind of specific showing that particular areas of park land would be adversely affected by the regulated activity. This decision expressly includes 80,000 acres of lakes, some portions of which are miles from the nearest federal land. See National Park Service Map LNPMW-VOYA-1001 (Feb. 1969) which appears as an appendix hereto. Moreover, the decision implicitly recognizes the authority of the Park Service to extend these regulations to private lands as well, although at the present time the Park Service has chosen not to do so. See 36 C.F.R. §1.1(b). In addition, the decision ignores the co-

operative good faith effort of the State of Minnesota, acting through its Commissioner of Natural Resources, in restricting hunting and trapping in the area, with the one minor exception previously noted.

Such a "broad brush" treatment of the problem is at odds with the specific, localized approach upheld in *Camfield* and *Alford*. In fact, the Park Serivces' position is consistent only with the proposition that it possesses at least concurrent legislative jurisdiction everywhere within the park, regardless of land ownership.

Furthermore, the decision here abandons the concept of nuisance as a standard for determining when the federal government is justified in reaching beyond its own property to regulate activities within the scope of the Property Clause. Instead of looking for an actual, seriously adverse interference with the federal property, the Court of Appeals was satisfied with identifying a *potential* conflict of uncertain magnitude that might manifest itself in some circumstances. The Court of Appeals agreed with the speculation of the District Court that duck hunting "usually occurs within close proximity of adjacent land areas" and "ducks *may* be shot over the public lands and pellets from discharging guns *may* rain upon the public territory and not inconceivably, cause injury to other park users." Memorandum of the Dist. Ct. at 9. (Emphasis added.) See 8th Cir. Op. at 8. Likewise, both courts hypothesized that "normal duck migration patterns *may* be changed" and the presence of hunters in the area *may* "cause a substantially greater burden on adjacent park land than what was originally envisioned." Memorandum of the Dist. Ct. at 10. (Emphasis added.) See 8th Cir. Op. at 8. On this basis the Court upheld a prohibition of *all* hunting everywhere in the park (except on private lands).

Both in terms of the nature of the activity involved and the geographic extent of its extraterritorial effect, the regulation upheld in this case goes far beyond anything yet approved by this Court. In the interests of maintaining the delicate balance of the federal system this matter deserves review.

CONCLUSION

The regulations contained in Title 36, Chapter 1, of the Code of Federal Regulations, among which are those pertaining to hunting (36 C.F.R. § 2.32) and firearms (36 C.F.R. § 2.11), are written as general requirements for areas over which the Park Service has jurisdiction. The decision of the Eighth Circuit in the instant case is that the Park Service has jurisdiction over the entire area of the park because activities within the park might somehow affect the management of federal lands, no matter how far away the activity regulated may occur from federal lands, no matter what the particular use of the nearest federal land and no matter whether significant interference with the management of any particular federal land is actually occurring or likely to occur. This decision authorizes the unilateral extension of federal jurisdiction over portions of states on the merest speculation that a threat to federal land might exist. Before such a major expansion of federal jurisdiction under the Property Clause is sanctioned, with the resultant change in historic federal-state relationships, it should have the benefit of this Court's consideration. The petition should be granted.

Respectfully submitted,

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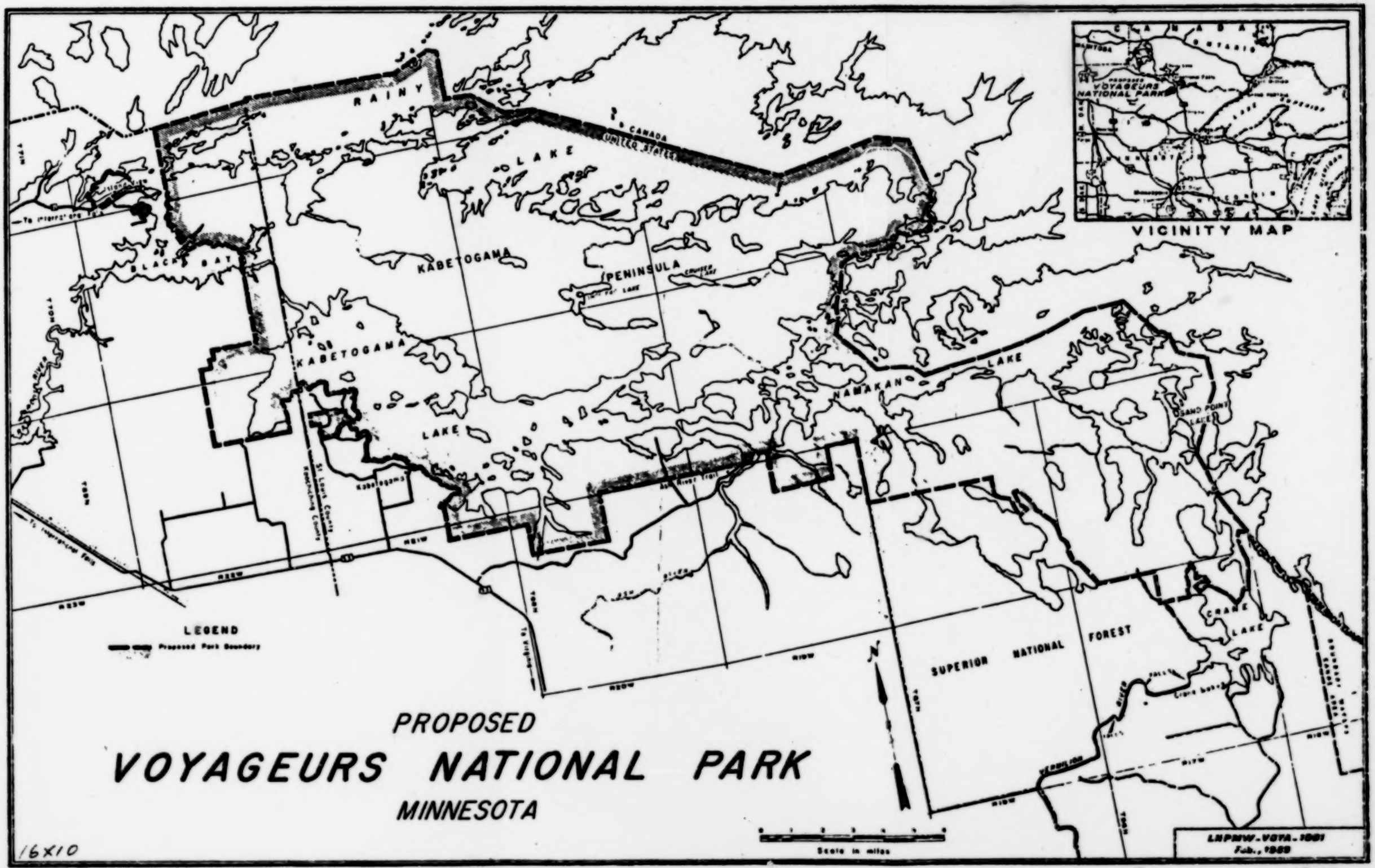

PROPOSED

VOYAGEURS NATIONAL PARK

MINNESOTA

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